



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII

999 18th STREET - SUITE 500  
DENVER, COLORADO 80202-2466

SDMS Document ID



2035022

February 26, 2001

Ref: 8ENF-L

Ms. Virginia Brannon  
Assistant Attorney General  
Natural Resources Section  
State of Colorado Department of Law  
Office of the Attorney General  
1525 Sherman Street, 5th Floor  
Denver, Colorado 80203

Dear Ginny:

With this letter, the United States Environmental Protection Agency, Region VIII ("EPA"), is informing you of its decision not to sign the site-specific "Data Release Agreement" for the VB/1-70 Superfund Site at this time. We regret that despite your efforts (and those of Jane Feldman) to help resolve this dispute, EPA cannot sign the agreement in its current form. Our objection is three-fold: (1) EPA does not believe the information, in the form it is to be provided to EPA by the State Department of Public Health and Environment ("CDPHE"), requires protection as confidential; (2) the February 1<sup>st</sup> draft of the Agreement is overbroad and procedurally cumbersome; and (3) even if the information is to be protected as confidential, a site-specific agreement is not warranted in light of the EPA/State Superfund Memorandum of Agreement ("SMOA"). The SMOA is enclosed for your information.

With regard to the first part of our objection, my understanding is that EPA is to receive only coupled soil and blood lead data. EPA will not be given the address where each sample was taken. Since EPA will not be obtaining the data in a fashion that breaches the subjects' expected confidentiality, EPA will not be in a position to breach that confidentiality. Only CDPHE will know the identity of the subjects of the study, since it, not EPA, will be matching the blood lead and soil lead data. Thus, EPA will not be able to identify the specific individuals from whom the medical monitoring data was collected. Further, since EPA will only release these results in the form of a statistical regression, the chance that these individuals could be identified by a third party is truly remote. Lastly, despite the fact that EPA will not be privy to any subject's address, we understand that the State is concerned that the address could be apparent to EPA from the soil data provided. As we explained in our recent conference call, EPA has developed internal guidelines for releasing soil sampling information and has denied requests under the Freedom of Information Act for sampling results matched to property address because of personal privacy and deliberative process concerns (as the enclosed letter documents). These guidelines continue to dictate EPA's response to any such request.

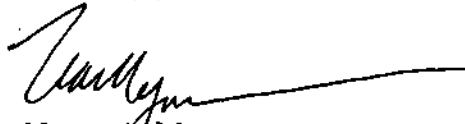


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Notwithstanding the preceding paragraph, the State should be advised that the results EPA does obtain from its regression analysis will and must be made public and available for review if this information is considered as part of EPA's remedy selection for the VB/I-70 Site. Moreover, even if the information is determined to be confidential, EPA must be able to release the data if ordered by a reviewing court, as the SMOA recognizes. The failure of the February 1<sup>st</sup> draft agreement to provide for this contingency makes it likewise fatally flawed.

I can be reached at (303) 312-6903 to discuss this issue with you at length, at your earliest convenience. I understand from Bonnie Lavelle, EPA's lead RPM for this Site that time is of the essence in reaching an agreement on this issue, since the State's delay in providing this information is negatively impacting EPA's ability to meet its publicly-announced schedule for issuing the OUI RI/FS. Thank you for your assistance in resolving this matter.

Sincerely yours,



Nancy A. Mangone  
Enforcement Attorney

Enclosures

cc: Bonnie Lavelle, 8EPR-SR  
Dawn Tesorero, 8 ENF-T  
Jane Feldman, Colo. AG's Office



SF. SMOA

MEMORANDUM OF AGREEMENT  
RECORD SHARING BETWEEN THE COLORADO DEPARTMENT OF HEALTH  
AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION VIII

1.0 Purpose of Agreement

- 1.1 This Memorandum of Agreement between the United States Environmental Protection Agency, Region VIII ("EPA") and the Colorado Department of Health, establishes policies, responsibilities and procedures with respect to the sharing of records. It also establishes the procedures for confidential treatment of documents between the parties. The primary purposes of this agreement are to promote the fullest possible access by each agency to records in the possession of the other agency and to prevent unauthorized disclosure of confidential information. This agreement only applies to the sharing of records pertaining to the pre-remedial and non-federal facility NPL sites in the State of Colorado.

2.0 Definitions

- 2.1 "Record" means anything within the scope of the definitions found at 40 CFR 2.100(b), and 6 CCR 1007-3, Section 2.100(h).
- 2.2 "Confidential record" (a) if held by EPA, means any record which would be exempt from the public availability requirements of the Freedom of Information Act, 5 U.S.C. Section 552(b), as amended; or (b) if held by the State, any record which would be exempt pursuant to the Colorado Open Records Act, C.R.S. 24-72-204, as amended, including privileges pursuant to litigation.
- 2.3 "Agency" means the United States Environmental Protection Agency or the Colorado Department of Health.

3.0 Exchanging Records

- 3.1 Making a request. A request by one agency for records possessed or believed to be possessed by the other shall be written and directed to:

David C. Shelton, Director  
Hazardous Materials and  
Waste Management Division  
4210 East 11th Avenue  
Denver, CO 80220

Robert L. Duprey, Director  
EPA, Region VIII Hazardous  
Waste Management Division  
One Denver Place  
999 18th Street, Suite 500  
Denver, CO 80202-2405

- 3.2 Responding to Requests. An agency in receipt of a request for records pursuant to this Agreement shall respond to that request within ten (10) working days. If the responding agency cannot make the requested records available within that period, it shall send a written explanation and proposed schedule for response to the requesting agency within the period (e.g., notice of proposed transfer of business confidential information has been given, but the notice period has not yet expired).

- 5.4 Denying a Request. If the responding agency does not have a record requested, it shall so inform the requesting agency. If the EPA Region VIII Hazardous Waste Management Division Director or the Hazardous Materials and Waste Management Division Director, as appropriate, determines that the agency is explicitly prevented by statute, or regulation, from making the record available to the requesting agency, written findings shall be provided to the requesting agency describing the responding agency's grounds for its determination. The responding agency shall also provide the requesting agency with a description of the record to which access is denied.

#### 6.0 Security Measures

Records for which confidentiality is requested under Part 5.2 above, shall be stored in a locked filing cabinet or a locked room. Such records shall not be left unattended while not being stored in a locked filing cabinet. Each agency shall maintain a record of all reviews of confidential records. Each person who is allowed by the EPA's Superfund Remedial Branch Chief or the State's Superfund Unit Leader to obtain access to the files must acknowledge by signature that he or she has read and agree to abide by the terms of this Agreement.

#### 7.0 Dispute Resolution

- 7.1 EPA and the State agree that timely resolution of interagency disputes is essential to the Superfund program. In the event of any disagreement concerning subjects covered in this Agreement, the agencies agree to follow the procedures set forth below:

1. Any substantial disagreement at the staff levels involving an EPA project manager and state project officer which, if unresolved, will result in significant delay of any scheduled response activity, will be referred to the respective Superfund section managers as soon as identified;
2. The respective Superfund section managers will attempt to resolve any disagreement within a maximum of five (5) working days; if section managers are unable to resolve the dispute, assistance of the EPA Superfund Remedial Branch Chief may be requested by either manager. The EPA Superfund Remedial Branch Chief will attempt to resolve the disagreement within five (5) working days of the request;

2. Disclosure of Confidential Business Information when confidentiality was requested by either agency, could constitute a violation of 40 CFR Section 2.211, and could result in penalties against the agency or individual involved as provided in 40 CFR Section 2.310(h), 42 U.S.C. Section 9604(e)(2)(B), and 18 U.S.C. Section 1905.
3. Disclosure of confidential information for which confidentiality was requested could result in cessation of exchange of confidential information for a period of time determined under the dispute resolution procedure of Part 7 of this Agreement or sanctions under 40 CFR Section 30.900 for violation of assistance agreements.

9.0 Renegotiation

- 9.1 This Agreement is subject to renegotiation as provided in the renegotiation clause of the Superfund Memorandum of Agreement ("SMOA") between the parties and is subject to an initial biannual, and thereafter annual, review as set forth in the SMOA.

By: \_\_\_\_\_

James J. Scherer  
EPA Regional Administrator  
Region VIII

Date: \_\_\_\_\_

6/15/90

By: \_\_\_\_\_

David C. Shelton, Director  
Hazardous Materials and Waste  
Management Division  
Colorado Department of Health

Date: \_\_\_\_\_

6/13/90



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8  
999 18<sup>TH</sup> STREET - SUITE 300  
DENVER, CO 80202-2466  
<http://www.epa.gov/region08>

NOV 29 2000

Ref: 8EPR-SR

Ms. Celia VanDerLoop  
City and County of Denver  
Department of Environmental Health  
1391 Speer Boulevard  
Suite 700  
Denver, CO 80204-2558

RE: Freedom of Information Act  
Request 08 RIN 033-01

Dear Ms. VanDerLoop:

This letter responds to your Freedom of Information Act request of August 8, 2000, concerning the addresses of all properties sampled by EPA and the corresponding sampling results for the Vasquez Boulevard/ Interstate 70 (VB/I70) Site Operable Unit 1 Phase III Field Investigation.

EPA is unable to provide you with the requested records because they are exempt from mandatory disclosure by virtue of 5 U.S.C. Section 552(b), Exemption 6, Personal Privacy, and Exemption 5-Deliberative Process. An itemized list of the records which are being withheld along with the basis for withholding is provided on the enclosure to this letter.

As you know, EPA has had difficulties in obtaining access from property owners in the VB/I70 study to collect samples. One of the reasons property owners refuse access is because they are concerned about how the information generated by EPA will be released. Many owners have stated concerns about protection of their privacy and expressed a desire to have a voice in deciding if specific information about their property would be released and to whom. In response to these stated concerns, EPA developed the following internal guidelines for EPA release of soil sampling information:

1. The sampling status of each property is fully disclosed by EPA. Any interested person can contact EPA and request information about whether or not a particular property was sampled by EPA. EPA informs the requester that the property was either sampled or not and, if sampled, informs them that the property owner has the results.
2. The concentrations of arsenic and lead found at specific addresses are released only by the property owner or by EPA after obtaining the property owner's concurrence. The majority of requests to EPA for the results of soil sampling at specific properties are from real estate



EPA Response: Each property owner has a letter that contains the sampling results. At properties where there is a potential for exposure to high levels of contamination, EPA has undertaken time critical clean up action. EPA has encouraged community members to ask property owners directly about the results at properties they are concerned about and to share their own results with their neighbors and friends. EPA makes results of sampling at public schools and parks available to the general public. This addresses concerns about exposure of children at places where they play. Finally, three public health agencies, EPA, CDPHE and ATSDR, are evaluating the results and taking appropriate actions at residences where there is potential for exposure to high levels of contamination.

2. *"The city believes that stigma would be removed from the low concentration properties by release of property identifiers."*

EPA Response: Owners of property where levels of arsenic and lead are below levels of concern have been explicitly notified in writing by EPA that their property is no longer considered part of the VB/I70 site. A total of 833 individual property owners have been so notified by EPA. Direct statements by EPA clarifying the status of individual properties will address stigma more effectively than full release of private information.

3. *"The evaluation of contaminant patterns cannot be done for Phase III data, that information would be useful for many involved at the site not only EPA. Mapping of Phase III data potentially could remove stigma from many homes without significantly affecting privacy interests. Mapping of Phase III data would also allow the city to better assess the potential for significant concerns outside of the current VB/I70 study area."*

EPA Response: EPA has previously provided the City of Denver with electronic files of the all sampling results (soil, vegetables, and dust) identified by a unique property number which is not the property address. The records are thus sanitized so that the identities of individual property owners cannot be determined from the record itself, or from the record in conjunction with publicly available information. In addition, on July 20, 2000, EPA transmitted the draft Baseline Human Health Risk Assessment for the VB/I70 Site to the City of Denver for review and comment. The risk assessment document contains two figures which illustrate the locations of properties where soil concentrations of lead and arsenic exceed EPA's acceptable risk levels. These two sources of information allow the City of Denver to understand the range of concentrations of arsenic and lead in all the media sampled, to independently calculate health risks associated with exposure at each property sampled, and to understand the general locations of properties where soil concentrations may present an unacceptable health risk. Further, this information allows the City to discuss the data with other interested parties by referring to the unique property identifiers. EPA is certainly willing to modify the way the data is presented in the figures contained in the draft risk assessment if these can be more useful to you.

4. *"The sampling results for Phases I and II were released using a property identification key that allows interested individuals to identify results on a specific property. .... We are unaware of significant adverse effects resulting from the release of the locational identifiers for the Phases I and II sampling results."*

FREEDOM OF INFORMATION ACT  
REQUEST 08 RIN 033-01

WITHHELD DOCUMENTS  
EXEMPTION 6 BALANCING TEST

requested document	threshold test	balancing test	
addresses of properties where EPA has collected samples and the corresponding sampling results from the Phase III Field Investigation, VB/170 Superfund Site	<p>personnel, medical, or similar file?</p> <p>Yes. The identification of individual property owners is readily available from publicly available tax assessor records. Knowledge of the property address is required to get this information. Disclosure of addresses where EPA has sampled along with the sampling results is thus information about particular individuals which is identifiable to those individuals.</p>	<p><u>privacy interest</u></p> <p>Individual property owners have an expectation of privacy with respect to the information about the levels of contaminants found on their property since, until EPA makes a final clean up decision, this information could adversely affect the value of the individual's property.</p>	<p><u>public interest</u></p> <p>While the public has an interest in levels of hazardous substances to which they may be exposed, such exposure is of a limited nature on non-public property owned by someone else. As important, that information is meaningless without an understanding of the appropriate action level. Thus, pending a cleanup decision, the privacy interest outweighs the public interest.</p>